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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO RODRIGUEZ,

Defendant and Appellant.

B220842

(Los Angeles County
Super. Ct. No. TA104014)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ricardo R. Ocampo, Judge. Affirmed.

Suzan E. Hier, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C.
Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Hugo Rodriguez appeals from the three-year sentence imposed by the trial court after finding him in violation of probation. Defendant contends the trial court abused its discretion in deciding to impose the upper term of three years rather than reinstate him on probation or impose the lower term of 16 months. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Underlying Offense

On December 4, 2008, police responded to a residence following a reported violation of a domestic violence restraining order. Arriving officers saw defendant attempt to punch Douglas Mancia. Yesenia Mancia identified defendant as her former boyfriend against whom the family had a restraining order. According to Yesenia Mancia, defendant had come to her home, demanded entry, became agitated and began screaming at her and her father, Douglas Mancia. Following his arrest, in the presence of officers, defendant threatened to shoot Douglas Mancia upon his release from custody.

In December 2008, defendant was charged with making a criminal threat (Pen. Code, § 422) and disobeying a court order (Pen. Code, § 166, subd. (a)(4)).

2. The Plea Agreement

Represented by appointed counsel, defendant was informed at the plea hearing that if convicted as charged in the December 2008 criminal complaint, he faced a maximum aggregate state prison term of three years six months. Instead, pursuant to a negotiated agreement, defendant was to plead no contest to making a criminal threat, and in return, imposition of sentence would be suspended and he would be placed on three years formal probation, on condition he serve 120 days in county jail and stay 200 yards away from the two victims.

3. The Sentencing Hearing

At the sentencing hearing on December 22, 2008, defendant was sentenced in accordance with the terms of the negotiated agreement. Among the conditions of his probation were that he serve 120 days in county jail with 28 days of presentence custody credits, and stay away from Douglas Mancia and Yesenia Mancia.

4. The Violation of Probation

On September 24, 2009, defendant was deported to Mexico. When he failed to appear in court on October 15, 2009 for an alleged probation violation, the trial court summarily revoked defendant's probation and issued a bench warrant for his arrest. Following defendant's arrest, he appeared in court on November 12, 2009. The bench warrant was recalled and defendant was remanded into custody.

At the outset of the probation revocation hearing on December 4, 2009, defendant, represented by appointed counsel, rejected the People's offer of a 16-month state prison term in return for his admission he violated probation. Counsel informed the court that defendant was aware he could be sentenced to a maximum term of three years in state prison if he were found in violation of probation following the hearing.

After hearing evidence and argument from counsel, the trial court found that defendant was in violation of his probation as a result of a new conviction (in case No. 9CA25698).¹ In response, defense counsel requested the court reinstate defendant on probation on condition he serve one year in county jail. The People urged the court to impose the upper term of three years in state prison.

The trial court denied defendant's request for reinstatement on probation and sentenced him to three years in state prison for making a criminal threat. The court found that defendant was not a suitable candidate for probation, based upon his prior conduct on probation. In explaining its reasons for imposing the upper term, the court stated "is that the nature of the charges and the threat of great bodily harm. In addition to that, the court has also considered his criminal history. The court sees that there is an escalating tendency towards violence starting out with vandalism escalating to violations, court

¹ Case references are to Los Angeles Superior Court cases. In case No. 9CA25698, pursuant to a negotiated agreement defendant pleaded no contest to one of 13 charged counts of violating a stay-away order issued as a condition of probation after a criminal conviction involving domestic violence (Pen. Code, § 166, subd. (c)(1)). Imposition of sentence was suspended, and defendant was placed on three years of summary probation, which included the condition he stay away from Douglas Mancía and Yesenia Mancía.

orders and [Penal Code section] 273.6. And finally the threats that are involved here. And, again, threats of great bodily injury or death. [¶] For those reasons, the court selects the high term of three years.”² In response to defense counsel’s query, the court stated in making its sentencing choice, the court considered only defendant’s criminal history as it existed at the time of his plea. The court noted it had read the probation officer’s report, which set forth defendant’s criminal history.

DISCUSSION

Sentencing choices such as the ones at issue in this case -- whether to grant or deny probation and, if denied, whether to sentence defendant to 16 months, two or three years in prison (see Pen. Code, §§ 422, 18) -- generally rest within the broad discretion of the trial court and will not be disturbed on appeal except on a showing the court exercised its discretion in an arbitrary or capricious manner. (*People v. Russel* (1968) 69 Cal.2d 187, 195 [“all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue”]; see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976–977; *People v. Downey* (2000) 82 Cal.App.4th 899, 909-910; see generally *People v. Sandoval* (2007) 41 Cal.4th 825, 847; *People v. Rodriguez* (1990) 51 Cal.3d 437.)

“In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citation.] Second, a “decision will not be reversed merely

² According to the probation officer’s report, defendant’s criminal record consisted of a 2006 conviction for driving under the influence, for which he received 36 months of summary probation; an August 26, 2008 conviction for vandalism, for which he received 36 months of summary probation; and an August 26, 2008 conviction for violating a protective order for which he received summary probation. He was also repeatedly found in violation of probation, for which he was sentenced to serve 30 or 45 days in county jail and probation was reinstated.

because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’”

[Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Although nominally recognizing this broad discretion, on appeal defendant contends the factors upon which the trial court relied to impose the upper term could not properly be considered as aggravating. Specifically, defendant maintains his three misdemeanor offenses, for which he received summary probation, do not reasonably support the court’s characterization of them as reflecting an increasingly violent criminal history. Defendant also argues the court improperly relied on the elements of the offense of making a criminal threat in selecting the upper term.

The trial court’s statements at the sentencing hearing establish it properly considered the circumstances existing at the time defendant was originally granted probation, including his earlier performance on probation and the nature of his prior offenses, gave considerable thought to its options and acted well within its discretion in denying defendant probation and in sentencing defendant to the three-year upper statutory prison term, the maximum sentence to which defendant agreed when he entered his plea.

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.